

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAKEISHA TALTON,

Defendant-Appellant.

UNPUBLISHED

November 21, 2000

No. 219009

Ingham Circuit Court

LC No. 98-074174-FH

Before: Doctoroff, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277. The trial court sentenced her to two years' probation, including six months in jail. We affirm.

Defendant claims on appeal that she was denied the effective assistance of counsel. Because defendant did not move for a new trial or a *Ginther*¹ hearing, our review is limited to errors that are apparent from the record. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999); *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999). In order to succeed on a claim of ineffective assistance of counsel, defendant must satisfy this Court that counsel's performance fell below an objective standard of reasonableness and she suffered prejudice as a result. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999); *People v Pickens*, 446 Mich 298, 303, 338; 521 NW2d 797 (1994). Defendant must show that, but for counsel's deficient performance, she would not have been convicted. *Hoag, supra* at 6; *Henry, supra*. Defendant must also overcome the presumption that counsel's conduct was sound trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). We conclude that defendant has not met this burden.

Defendant contends that counsel was deficient in failing to object to (1) leading questions asked by the prosecutor, and (2) hearsay statements admitted at trial. We disagree. We are satisfied that counsel's failure to object to leading questions and hearsay evidence during trial can be attributed to trial strategy. See *People v Reed*, 449 Mich 375, 400; 535 NW2d 496 (1995);

¹ *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

People v Ullah, 216 Mich App 669, 685; 550 NW2d 568 (1996). Also, defendant has not demonstrated that there is a reasonable probability that but for counsel's conduct, the outcome of these proceedings would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997).

Defendant also argues that counsel was ineffective in failing to object to the prosecutor's improper impeachment of a witness. Our review of the record indicates that the prosecutor properly laid a foundation before attempting to impeach the witness with proof of her prior inconsistent statement. *People v Barnett*, 165 Mich App 311, 315; 418 NW2d 445 (1987). While we agree with defendant that the admission of the statement into evidence amounted to the improper admission of hearsay, *People v Jenkins*, 450 Mich 249, 256-257, 261; 537 NW2d 828 (1995), we conclude that counsel's failure to object to the admission of the statement may have been strategically motivated, and we are satisfied that admission of the statement did not affect the outcome of these proceedings. *Reed, supra; Mitchell, supra*.

We also conclude that counsel's decision to request that the jury be instructed with CJI2d 7.15 instead of CJI2d 7.22 was a valid strategic decision in light of the evidence adduced at trial that defendant committed this assault with a dangerous weapon. We reach this conclusion in light of the maxim that decisions regarding jury instructions are strategic choices better left to the competence of defense counsel. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999); *People v Thompson*, 69 Mich App 465, 467; 245 NW2d 93 (1976).

We are also satisfied that counsel's decision not to request an instruction on the lesser included misdemeanor offense of assault and battery was proper in light of the uncontroverted evidence that defendant used a weapon in this assault. The decision not to request an instruction on a lesser included offense is a matter of trial strategy. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996); *People v Robinson*, 154 Mich App 92, 94; 397 NW2d 229 (1986); *People v Rone*, 109 Mich App 702, 718; 311 NW2d 835 (1981). As we previously have stated, "[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy nor will it assess counsel's competence with the benefit of hindsight." *Rockey, supra* at 75-76.

Defendant next asserts that she was denied her right to a fair trial due to numerous instances of prosecutorial misconduct. Because defendant asserts an unpreserved claim of constitutional error, we review for plain error. *People v Carines*, 460 Mich 750, 764, 774; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Defendant must show a plain error affecting her substantial rights occurred at trial, i.e., that the error affected the outcome of the trial. *Id.* at 763. Only after defendant has satisfied these requirements must this Court exercise its discretion in determining whether to reverse. *Id.*

In light of our conclusion that the prosecutor properly impeached the witness, defendant's allegation of prosecutorial misconduct in this regard is without merit. We also note that the prosecutor's offer of the prior inconsistent statement into evidence was not misconduct because defendant has not demonstrated bad faith on the part of the prosecutor, or that she suffered any prejudice from the admission of the statement. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

Similarly, we conclude that the prosecutor's closing comments to the jury were proper. The prosecutor was clearly drawing a reasonable inference from the facts adduced at trial when she argued that the victim in this matter was carrying the broom in a non-threatening manner. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Schutte, supra* at 721. Evaluating the comments of the prosecutor in light of defense arguments, we also conclude that the prosecutor did not improperly appeal to the sympathy of the jury because she was rebutting defense allegations that the victim was the aggressor. *Schutte, supra*. Under these circumstances, we find no plain error necessitating reversal.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Joel P. Hoekstra
/s/ Jane E. Markey